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In The

Supreme Court of the United States

October Term, 1967

EDDIE W. PATTON,

Respondent

v.

STATE OF NORTH CAROLINA,

Petitioner.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit.

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TO: THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the case of EDDIE W. PATTON v. STATE OF NORTH CAROLINA entered on June 14, 1967. The Fourth Circuit denied a petition by the State of North Carolina for a rehearing of this case en banc on September 5, 1967.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported as EDDIE W. PATTON v. STATE OF NORTH CAROLINA, ...F. 2d..... (4th Cir. 1967) and is printed as Appendix C to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on June 14, 1967. On September 5, 1967 the Fourth Circuit entered an order denying a petition for a rehearing of this case en banc which had been filed by the State of North Carolina. (See Appendix D).

The jurisidiction of this Court is invoked under 28 U. S. Code, Section 1254(1).

QUESTION PRESENTED

MAY A DEFENDANT BE SENTENCED TO A LONGER TERM OF IMPRISONMENT AT A SECOND TRIAL THAN HE RECEIVED AT HIS FIRST TRIAL AFTER THE FIRST TRIAL HAD BEEN VACATED ON THE GROUND THAT DEFENDANT WAS UNREPRESENTED BY COUNSEL AT THE FIRST TRIAL?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides as follows:

> Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Fifth Amendment to the Constitution of the United States provides as follows:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indict-

ment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

STATEMENT OF THE CASE

In October of 1960 Eddie W. Patton was placed on trial in the Superior Court of Bladen County, North Carolina, upon a charge of armed robbery. Patton was tried with two co-defendants, Sam Clark and Roy Robinson. Clark and Robinson were represented by counsel, but Patton was not. At the conclusion of the State's evidence, all three defendants, including Patton, entered pleas of nolo contendere to the charge of armed robbery. Patton was sentenced to a term of imprisonment of twenty years.

In April 1964 Patton applied to the North Carolina Supreme Court for a new trial on the basis of the decision of GIDEON vs. WAINWRIGHT, 372 U. S. 335 (1963). The North Carolina Supreme Court remanded the case to the Bladen County Superior Court. At the November 1964 Session of the Bladen County Superior Court, Patton was awarded a new trial.

In February 1965 Patton was again tried in Bladen County upon the charge of armed robbery, and was found by a jury to be guilty of that crime. Patton was represented by counsel at that trial. The trial judge, in sentencing Patton, stated that he was taking into account the fact Patton had served nearly five years under the vacated sentence, that he would have given him five more years than the sentence imposed, that he was allowing Patton credit for the time he had served, and imposed a sentence of twenty years. (See Appendix A). No appeal was taken to the North Carolina Supreme Court.

In August 1965 Patton applied to the United States District Court for the Western District of North Carolina for a writ of habeas corpus. On August 16, 1965 the District Court dismissed the petition. On January 14, 1966 the Fourth Circuit Court of Appeals remanded the case to the District Court.

On April 19, 1966 a hearing was held in the District Court. On July 19, 1966 the District Court held Patton's second sentence unconstitutional on the ground that the increased punishment in the case violated the due process and equal protection clauses of the Fourteenth Amendment. PATTON v. NORTH CAROLINA, 256 F. Supp. 225 (W.D.N.C. 1966), reprinted as Appendix B to this petition.

Upon appeal by the State of North Carolina to the United States Court of Appeals for the Fourth Circuit, it was held that the sentence imposed at Patton's second trial violated the due process and equal protection clauses of the Fourteenth Amendment and the double jeopardy provision of the Fifth Amendment. PATTON v. NORTH CAROLINA, ...F 2d..... (4th Cir. 1967), reprinted as Appendix C to this petition. This opinion was filed on June 14, 1967. The State of North Carolina subsequently filed a petition for a rehearing of this case by the Fourth Circuit Court of Appeals en banc. On September 5, 1967 the Fourth Circiut denied this petition for a rehearing en banc.

REASONS FOR GRANTING THE WRIT

(1) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions by the North Carolina Supreme Court on the question of whether or not a defendant may be given a longer sentence at a second trial than he received at the first trial which had been set aside.

(2) The decision of the United States Court of Appeals for the Fourth Circuit in this case is in conflict with decisions rendered by other circuits on this same question.

The District Court held that it would be a violation of due

process and equal protection to impose a harsher penalty at the second trial "without there being contained in the record any facts tending to rationally support the imposition of such penalty. . . ." The Fourth Circuit Court of Appeals held in this case that under no circumstances could a longer sentence be imposed at the second trial than was imposed at the first trial, and that to do so would be a violation of the due process and equal protection clauses of the Fourteenth Amendment and of the double jeopardy provision of the Fifth Amendment. This decision of the Fourth Circuit is in conflict with the decisions rendered by the Supreme Court of North Carolina in the following cases: STATE vs. WHITE, 262 N. C. 52, 136 S. E. 2d 205 (1964); STATE vs. ANDERSON, 262 N. C. 491, 137 S. E. 2d 823 (1964); STATE vs. SLADE, 264 N. C. 70, 140 S. E. 2d 723 (1965); STATE vs. WEAVER, 264 N. C. 691, 142 S. E. 2d 633 (1965); STATE vs. PEARCE, 268 N. C. 707, 151 S. E. 2d 571 (1966).

The position of the North Carolina Supreme Court is set forth in the case of STATE vs. WHITE, 262 N. C. 52, 136 S. E. 2d 205 (1964). The Court, in that decision, noted: "The defendant at his request was granted a new trial of his case tried at the May 1961 Criminal Term in which he was found guilty as charged in the indictment, which under our decisions results in a retrial of the whole case, verdict, judgment, and sentence. (Citations omitted)." The North Carolina Supreme Court then went on to determine: "There is nothing in the record to suggest that (the trial judge) imposed upon defendant a heavier sentence than he received at the first trial merely because he obtained a new trial. When defendant, at his request, obtained a new trial, hoping to be set free or obtain a lighter sentence, he accepted the hazard of receiving a heavier sentence, if convicted at the new trial of the same identical offense, and this is not a denial to him of any constitutional right as contended by him."

In STATE vs. PEARCE, 268 N. C. 707, 151 S. E. 2d 571 (1966), the North Carolina Supreme Court again held that a longer sentence could be imposed at a retrial than had been

imposed at the first trial. This opinion was handed down after the District Court opinion in this case, PATTON vs. NORTH CAROLINA, 256 F. Supp. 255 (W.D.N.C. 1966) was decided. The North Carolina Supreme Court declined to follow the District Court opinion in the PATTON case, stating that "(w)e adhere to our former decisions." 268 N. C. at 708, 151 S. E. 2d at 572.

The Maryland Court of Special Appeals has already declined to follow the Fourth Circuit Court of Appeals decision in the Patton case in MOON vs. STATE, 232 A. 2d 277 (1967), stating that it adhered to the former Maryland decisions on this question. The State of Maryland is within the jurisdiction of the Fourth Circuit Court of Appeals.

The various circuits are also in disagreement as to whether or not a longer sentence may be imposed at the second trial.

In MARANO vs. UNITED STATES, 374 F. 2d 583 (1st Cir. 1967), defendant Marano had received a sentence of three years at his first trial after being convicted in the U. S. District Court of receiving stolen goods transported in interstate commerce. Upon appeal, his conviction was set aside and a new trial granted. At his second trial he was again convicted of the same offense and received a five year sentence. The same judge who had presided at Marano's first trial also presided at his second trial. The court, in imposing the five year sentence, expressly disclaimed that it was penalizing the defendant, and gave two reasons for increasing the sentence: "Mr. Marano's sentence was based on evaluation of the presentence report and the additional testimony which came out at the trial."

It was held by the First Circuit Court of Appeals in MARANO that a sentence may not be increased following a successful appeal, even where additional evidence has been introduced at the second trial. It recognized an exception with respect to presentence reports, stating that "we do not think it inappropriate for the court to take subsequent events into consideration, both good and bad." 374 F. 2d at 585. The court in that case also stated that if a sentence

was increased following retrial the "grounds for doing so should be made affirmatively to appear." Id. at 585-86, N. 3.

In determining that defendant Marano's second sentence of five years was improper, the First Circuit stated: "As we have recently held, a defendant's right of appeal must be unfettered. WORCHESTER vs. COMMISSIONER OF INTERNAL REVENUE, 1 Cir. 1966, 370 F. 2d 713. So far as sentence is concerned, this principle cannot be restricted to those situations in which a defendant, in deciding whether to appeal, must contemplate the certainty of an increased sentence if he obtains a new trial and is convicted again. Not only must he not be faced with such a certainty, WORCHESTER vs. INTERNAL REVENUE, supra, he likewise should not have to fear even the possibility that his exercise of his right to appeal will result in the imposition of a direct penalty for so doing." 374 F. 2d 585. The First Circuit cited the District Court opinion in the PATTON Case in support of this statement.

In STARNER vs. RUSSELL, 378 F. 2d 808 (3d Cir.) cert. denied, ... U. S. ..... (1967), the Third Circuit Court of Appeals stated the question to be determined in that case as follows: "The sole issue in this case is the right of a State court to increase punishment following a new trial where the first sentence imposed on the prisoner's plea of guilty is less and vacated on the prisoner's contention that he was denied counsel as required by GIDEON vs. WAINWRIGHT, 372 U. S. 335, 83 S. Ct. 792, L. Ed. 2d 799." 378 F. 2d at 810.

In this case, the United States District Court had held the second sentence to be unconstitutional because of the insufficiency of the sentencing court's reasons for imposing a greater sentence on the basis of the opinion in the case of PATTON vs. STATE OF NORTH CAROLINA, 256 F. Supp. 225 (W.D.N.C. 1966). The Third Circuit Court of Appeals held this to be error.

In STARNER the Third Circuit Court of Appeals specifically disagreed with that portion of the opinion of the First Circuit Court of Appeals in MARANO vs. UNITED

STATES which is quoted above and in support of which the District Court case of PATTON vs. NORTH CAROLINA was cited. The Third Circuit stated, at page 811: "We differ with the court's opinion for the reason that we cannot properly speculate that the court certainly will increase the sentence, after a new trial. To so hold would seem to trespass the integrity of the trial judge who, upon hearing all of the evidence, with the whole panorama of defendant's crime laid out before him, conscientiously passes sentence in accordance therewith, even though here the defendant did not take the stand nor call witnesses on his behalf. The sentence thus imposed by the trial judge cannot, in any sense, be said to be for his appealing, unless we again attribute to him a base motive—penalizing him for his appeal, conduct unworthy of the name of judge—rather than for his weighing and evaluating the measure of defendant's crime and passing sentence thereon, in the light of the wider, factual area incompassed by the trial which, in most instances, is far more revealing than those factual elements taken into consideration in the imposition of sentence upon a plea of guilty. . . . When he appeared and entered a plea of not guilty at the second trial, the slate had been wiped clean and it was an entirely new case and bore no relationship whatsoever to his previous plea of guilty which he had entered."

Another reason given by the Third Circuit Court of Appeals in upholding the longer sentence given at the second trial in the STARNER Case would also apply to Patton's situation. At his first trial, Patton entered a plea of nolo contendere. At his second trial, Patton entered a plea of not guilty and was found by a jury to be guilty as charged. Starner had entered a plea of guilty at his first trial, and at his second trial had entered a plea of not guilty and was found by a jury to be guilty as charged. The Third Circuit stated at 378 F. 2d 811: "Furthermore, there is much to be said for the Commonwealth's position that on a plea of guilty the defendant has already entered on the rehabilitative process, that he is purging himself thereby on his wrong doing, and it must be conceded that a sense of contrition therefore must have motivated his conduct and, accordingly, consideration might well be given therefor. However, when

he elects to have his case retried before a jury, he takes a chance after conviction on the trial judge's discretion in sentencing him. In ROBINSON vs. JOHNSTON, D. C., 50 F. Supp. 774, one Robinson, a prisoner at Alcatraz, filed a petition for habeas corpus in 1939, alleging that he had not been represented by legal counsel and was sentenced under the Lindbergh Act for the crime of kidnapping. A new trial was granted, counsel obtained for him, the jury convicted him and the court sentenced him to death. The sentence was affirmed by the Circuit Court of Appeals, ROBINSON vs. UNITED STATES, 144 F. 2d 392, 393, and by the Supreme Court of the United States at 324 U. S. 282, 65 S. Ct. 666, L. Ed. 629. Undoubtedly, it would therefore seem to be the rule in the Federal system that a trial judge, when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and that it is unnecessary to articulate the reason for any differentiation in the term of the sentence."

In UNITED STATES vs. WHITE, 382 F. 2d 445 (7th Cir. 1967), the Seventh Circuit Court of Appeals specifically declined to follow the Fourth Circuit Court of Appeals decision in PATTON vs. NORTH CAROLINA, ... 2d. ....., (4th Cir. 1967) and the First Circuit Court of Appeals decision in MARANO vs. UNITED STATES, 374 F. 2d. 583 (1st Cir. 1967). In determining that the imposition of a longer sentence at the second trial than was imposed at the first trial did not violate the due process clause of the Fourteenth Amendment nor the double jeopardy provision of the Fifth Amendment, the Seventh Circuit stated that "we approve of the statement of the Third Circuit in UNITED STATES EX REL. STARNER vs. RUSSELL, NO. 16392, (3d Cir., May 25, 1967), that a trial judge, 'when a new trial is ordered, may impose a sentence greater than one he had earlier vacated, and . . . it is unnecessary to articulate the reason for any differentiation in the term of the sentence.'" 382 F. 2d at 449-50.

As to the argument that imposing a longer sentence at the second trial than was imposed at the first trial violated the double jeopardy provisions of the Fifth Amendment, the

Seventh Circuit Court of Appeals stated: "Similarly as to the defendant's double jeopardy argument, we do not believe that the Fifth Amendment prohibits different punishments upon reconviction for the same crime following a successful appeal when the punishment, whether imposed by the same or a different district judge, results from the judge's exercise of his traditional discretionary function of considering a variety of sentencing factors, many of which have no direct relationship to the crime itself.

"We are fully aware of the recent decisions of other courts, dealing with these and related questions, which have expressed views contrary in many respects to those expressed herein. We think, however, that the pronouncement of a constitutional principle as sweeping and inflexible as that discussed in certain of these decisions and urged here by the defendant should await the considered judgment of the Supreme Court, particularly as that Court may choose to refine or abandon whatever distinctions remain between GREEN vs. UNITED STATES, 355 U. S. 184 (1957), and STROUD vs. UNITED STATES, 251 U. S. 15 (1919)." 382 F. 2d 448.

Therefore, it is respectfully submitted that this Court should exercise its jurisdiction in granting the writ of certiorari to review the decision of the United States Court of Appeals for the Fourth Circuit in this case so that the conflict in the decision rendered by the Fourth Circuit Court of Appeals and the decisions rendered by the Supreme Court of the State of North Carolina, and the conflict in the decisions from the various Circuit Courts of Appeal, on the question presented here, may be settled.

Respectfully submitted,

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Appendix A

STATE OF NORTH CAROLINA	)	IN THE SUPERIOR
	)	COURT
COUNTY OF BLADEN	)	FEBRUARY 1965
	)	MIXED SESSION
DOCKET NO. 6/100	)	
STATE OF NORTH CAROLINA	)	
	)	
—VS—	)	TESTIMONY
	)	
EDDIE WALTER PATTON	)	
	)	

This cause came on to be heard before the Honorable Raymond B. Mallard, Judge Presiding, at the February, 1965, Mixed Session of the Superior Court of Bladen County, North Carolina.

Appearing on behalf of the State of North Carolina was the Hon. John B. Regan, District Solicitor of the 9-A Solicitorial District, of St. Pauls, North Carolina.

Appearing on behalf of the Defendant was Mr. Giles R. Clark, of the firm of Grady & Clark, of Elizabethtown, North Carolina.

The following is a transcript of testimony as taken upon the trial of this matter after the jury brought back its verdict and until the end of said hearing.

* * * * * * *

THE COURT: All right, Mr. Clark, I will hear any motions you have to make, if any. I will hear any evidence you have to offer, if any, with respect to the question of punishment. I will hear anything that the Defendant has to say with respect to the question of punishment or any witnesses that he has to offer.

MR. CLARK: If it please the Court, we would like to move to set the verdict aside as being contrary to the law and evidence.

THE COURT: Motion denied. The Defendant excepts.

MR. CLARK: If it please the Court, we would like to move for a new trial for errors assigned and to be assigned.

THE COURT: Motion denied. The Defendant excepts. (pause) Anything else?

MR. CLARK: If it please the Court, I do not know this man well; I, of course, do not know him as a citizen of this County. My association with him altogether has been through appointment made by the Court to represent him in first, the post-conviction hearing that was held back, I believe, at the November Term of our Superior Court of Bladen County, and again as his counsel, defense counsel, in this proceeding. I do know that he has some past record. I understand that his past record is somewhat lengthy; that he is now, I believe, some forty-three years of age. (to the Defendant) Is that right? Forty-seven years of age; that he is now forty-seven years of age, and has been for a good part of his life confined to some of the penal institutions of this country. I would like to point out to the Court that he has, since the 10th day of June, 1960, been continuously in custody as a result of the offense with which he was tried in this Court. He was arrested, I believe, apprehended on that date and brought to trial . . . .

THE COURT: . . . . Let the record show that I will take that into consideration in imposing punishment.

MR. CLARK: Very well, sir. If your Honor please, for the record I believe the trial was in the Fall Term of 1960, the October . . . .

THE COURT: . . . . Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years.

MR. CLARK: Four years and eight months.

THE COURT: Nearly five years. All right, I will take that into consideration, and the record will so show. Before I announce punishment. I don't say that—I don't want him or anyone else to get the impression that the sentence the Court imposes, that five years is to be deducted therefrom.

MR. CLARK: I understand, your Honor.

THE COURT: The Court is taking it into consideration before imposing the sentence, and the record is and will so show.

MR. CLARK: All right, sir. We merely wished to call that to the Court's attention, that that situation does exist. The offense of which the jury has found him guilty, as the Court well knows, is one which could subject him to the maximum imprisonment of thirty years in the State's Prison. Thirty years, your Honor, is a period of time that to me is almost beyond estimation simply because of the fact that I haven't been here too much longer than that myself. It is a period of time, your Honor, that represents almost my entire lifetime. If the calendar would roll back on me for a period of thirty years, I would be a boy five years of age; if it would roll back on me for a period of twenty years, I would then be a lad of fifteen years of age.

THE COURT: You are going to tell us you are just thirty-five years old if you don't watch out, Mr. Clark.

MR. CLARK: I thought it would make the point, your Honor. The period of twenty years, or back at the time that I was fifteen years of age, represents, I think, practically every accomplishment that may have been made. This, if your Honor pleases, is in comparison to what time he has already served. During that time I was completing my high school education, my college education, and I served my time in the Armed Forces of the United States, had gone back to college and finished my law degree, and practiced for some six years. I was married and two of my children were born. It is a lot of time to take into consideration. This man at

his age, your Honor, probably doesn't have another twenty or thirty years left. I think that the Court—that a sentence of such severity would be tantamount to giving the Defendant a life sentence. We ask the Court to give consideration to this.

THE COURT: Mr. Patton, is there anything you want to add to what your lawyer, Mr. Clark, has said? If so, I will hear you.

DEFENDANT: I would like to start off by adding that I meant to come down here and plead guilty and beg for a lighter sentence. Most times I got out of prison, I waited until I got out to try and straighten up. This time I started the day I got here. I was in on a break when I came down here; I wish you would take that into consideration, and in November I would be eligible for parole. I don't have anyone to help me, and I feel I wouldn't make it anyway.

THE COURT: Are you referring about the prior sentence that was imposed on you?

DEFENDANT: Yes, sir.

THE COURT: That was wiped off . . . .

DEFENDANT: . . . . Yes, I understand that.

THE COURT: . . . . Mr. Patton, as your motion, because you moved that it be—and alleged and the Court found that your constitutional rights had been violated upon your motion, and that was all done away with. We are now confronted with a new day.

DEFENDANT: Yes, sir. I understand that.

THE COURT: All right.

DEFENDANT: Well, to be the way I would put it, I felt like I had life anyway, and not any hopes of getting out. And

a person without is—Well, I don't know whether you would —I know that you couldn't understand how it would be without hope.

THE COURT: No, sir. I am not without hope, bceause I am a Christian. Are you?

DEFENDANT: I believe there is a God. I am not a Christian . . . .

THE COURT: . . . . Then I can see maybe why you are without hope. (pause) Let the jury come in.

Whereupon, the Court took the verdict of the jury as to another trial had at this Session of Court, following which:

THE COURT: Mr. Patton, no one can have any hope who is without Christ.

DEFENDANT: If your Honor would let me explain . . . .

THE COURT: . . . . Yes, sir, I will.

DEFENDANT: I don't believe in penitentiary and jail as a Christian. I do believe there is a God, and I believe that either side—there was a thief on either side—and both of them knew they were in the presence of God. The first one stated to him, "You being the Christ, call your angels and get us down. You said he would give you charge over them." And the other one said, "Antagonize this man not. You and myself are justified in being here, and he is unjustly accused." He said, "Remember me when you come into your kingdom." He said, "This day you will dwell with me in Paradise." Well, they both (some unintelligible) One was interested in soul salvation; the other one was only interested in getting down. That is why I say I don't believe in jail house or penitentiary religion. If I had anything to say to God, I would throw up my head and do it humbly, and not for show. Is there anything else you would like to ask me?

THE COURT: No. You are the one that is telling me any-

thing you want to. I am the one who is going to do this sentencing. Anything you want to tell me, you tell me. You have told me you didn't have any hope. I told you that every man without Christ has no hope, but I do have hope because I am a Christian.

DEFENDANT: If your Honor please, I said I didn't have any help. All I have got is hope. I base that on the time I have already built.

THE COURT: All right, sir.

DEFENDANT: I have escaped numbers of times, but in the end I had to face up to it, and I would always think, "Now, whenever I get out, I will do better." That didn't solve nothing either. This time I did better before I left. I didn't have but two infractions against me in all that time. I am an alcoholic

THE COURT: Alcoholic in prison, Mr. Patton?

A. No, sir. Alcoholism is a progressive disease.

THE COURT: That is what the liquor distilleries want to brainwash people and say it is. Alcohol is something that somebody deliberately drinks. Alcohol is.

DEFENDANT: Well, I know there isn't any excuse for it. I don't hide behind it. I wish you—Well, I think even before —I meant to plead guilty and beg, but I was scared.

THE COURT: You did that before, did you?

DEFENDANT: No, sir. I didn't beg; I was scared to even open my mouth. (Some unintelligible) I didn't even do that.

THE COURT: Did you plead guilty when you were tried before?

A. Yes, sir. No, sir, I plead nolo contendere, or no con-

test. And I wish you would take into consideration that I did waive extradition and waived a preliminary hearing and entered that plea.

THE COURT: All right. Anything you want to tell me about your past record?

DEFENDANT: It is bad.

THE COURT: Were you ever married?

DEFENDANT: Yes, sir. I drank up two beautiful wives and my daughter.

THE COURT: What do you mean you drank them up?

DEFENDANT: Well, some people say they drank up a fortune. I never had a fortune. I feel like anybody in this country here, even if they don't have money they are not poor, not here. All I ever had that I could be proud of was two beautiful wives, and I had one thirteen year old daughter, thirteen years old this week.

THE COURT: Thirteen years old when?

DEFENDANT: The 17th day of this month, this week.

THE COURT: What about your past criminal record? Do you have any?

DEFENDANT: Sir?

THE COURT: What about your past criminal record? Do you have any?

DEFENDANT: Yes, sir.

THE COURT: Do you want to tell me about that?

DEFENDANT: Well, I wouldn't know where to start, sir.

THE COURT: What do you mean, you wouldn't know where to start?

DEFENDANT: Well, I have been in trouble all my life.

THE COURT: What do you mean, been in trouble?

DEFENDANT: Well, I mean in prison.

THE COURT: All your life?

DEFENDANT: Yes, sir, ever since I was about eighteen or nineteen years old.

THE COURT: All right. Anything else you want to tell me?

DEFENDANT: No, sir.

THE COURT: Mr. Clark, do you have anything further?

MR. CLARK: Your Honor, I would just like to say by way of explanation that when Mr. Patton says he believes he has no help, I think what he is referring to there, your Honor, is that he feels . . . .

THE COURT: . . . . I understood him to say "hope," but he corrected me.

MR. CLARK: What I understood him to mean is this: is that whatever sentence may be imposed on him in this Court, the probabilities are that he would serve it. He has no one on the outside, as I understar ' it, to help him arrange to find a job and maybe bearing the expense (some unintelligible) He was raised, as I understand it, by his grandmother. She has since deceased, and there is no member of his family, no part of his family, that he can call on to give him any assistance. I would like to present to the Court—I have shown it to Mr. Regan—a statement that was mailed to me by Captain J. B. Conyers (phonetic) of the

McDowell County Prison Unit, where Patton has served two years, stating that he has made a good inmate and that he has been promoted to Honor Grade. I would like to present this to the Court.

THE COURT: Was that after you escaped or before you escaped?

MR. CLARK: Your Honor, that was mailed to me at the time of the Post-conviction hearing in October on the issue referring, your Honor, to previous sentences.

THE COURT: I notice that this has no date whatever on it, Mr. Clark. Did you notice?

MR. CLARK: I didn't notice that; it was received by . . .

THE COURT: . . . . It has no date. It could have been one year, ten years, or five years ago.

MR. CLARK: It was received by me in October.

THE COURT: Anything else?

MR. CLARK: No, sir.

THE COURT: Anything else, Mr. Patton?

DEFENDANT: No sir.

THE COURT: Anything, Mr. Solicitor?

MR. REGAN: If your Honor pleases, we have his fingerprint record. He is forty-seven years old. He started at seventeen; went to Salem; larceny, two months; paid those. Then in '37, D.C.D., two months, and the only thing I can figure that is driving a car drunk, I don't know, but that was two months. Then, in '38, Public Drunkenness, thirty days. Again in '38, Robbery with Firearms, seven to ten years, he was paroled . . .

THE COURT: . . . . Robbery with Firearms?

MR. REGAN: Yes, sir. Seven to ten years, he was parolled, it was revoked, and he was returned to prison and he served his sentence. And then in '48, Driving While Drunk and what I translate to be House breaking and Grand Larceny, and shows no disposition. And again in '48, Larceny of an Automobile and Jailbreaking, shows no disposition. Then in September of '48, Grand Larceny and Using a Car Without Owner's Consent, nine years.

THE COURT: Where was that? That wasn't in North Carolina, was it?

MR. REGAN: No. It was the Columbia, South Carolina, State Penitentiary. Then the next is this Public Drunkenness in Hickory, North Carolina, in '52. I don't know what that means where it just has a INV.

THE COURT: Investigation.

MR. REGAN: Investigation (one or two words unintelligible) picked up for Public Drunkenness. Then in 1955, Operating Without an Operator's License, 30 days. Again in '55, Assault With a Deadly Weapon, to-wit: a pistol, four months suspended. Then in 1958, in Columbia, South Carolina, Assault and Battery of a High and Aggravated Nature, eighteen months. Then there is another entry in Orlando, Florida, the only chart is DRK, I assume possibly it means drunk, it shows no disposition. Then, there is another entry that shows three 9 month sentences for escape concurrently; and some abbreviation I am not absolutely sure I translated them right; and then this robbery in Elizabethtown.

THE COURT: Is that a correct statement of your record Mr. Patton?

DEFENDANT: Yes, sir.

THE COURT: All right. Anything else about that, Mr. Clark, you want to call to my attention, I will hear you.

MR. CLARK: He says he has nothing further to say about it, your Honor.

THE COURT: Stand up, Mr. Patton. The statute provides upon conviction of Robbery With Firearms such person shall be punished by imprisonment for not less than five nor more than thirty years. You have been—This is the second time, one time there that you say you have been convicted of robbery and were given probation or a suspended sentence or parolled or something, and had to come back and serve it again. Robbery With Firearms that time. I agree with you, sir. I feel sorry for you. I feel sorry for all people in trouble. I am going to give you—I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the Court is that the Defendant be imprisoned in the State's Prison for a term of twenty years, to be assigned to do labor as provided by law. He is in your custody, Sheriff.

* * * * * * *

STATE OF NORTH CAROLINA	)	IN THE SUPERIOR COURT
	)	
COUNTY OF BLADEN	)	FEBRUARY 1965
	)	MIXED SESSION
DOCKET NO. 6/100	)	
STATE OF NORTH CAROLINA	)	
—VS—	)	CERTIFICATE
EDDIE WALTER PATTON	)	

I HEREBY CERTIFY that I am the duly appointed Court Reporter for the Thirteenth Judicial District of North Carolina, which District is comprised of the Counties of Bladen, Columbia, and Brunswick; that I have been active in that

capacity since the Fall of 1963, and did so report at the February, 1965, Mixed Session of the Superior Court of Bladen County; that the foregoing thirteen pages of testimony were taken by me in the above entitled matter at said Session of Court by shorthand notes and/or dictaphone recording, and the same was later transcribed into typewritten copy by me; that the foregoing thirteen pages of testimony is a true and accurate transcript of the proceedings in the above entitled matter commencing after the verdict was rendered by the jury and concluding with the end of the hearing.

This the 7th day of January, 1966.

SYLVIA P. EDWARDS, COURT REPORTER,
THIRTEENTH JUDICIAL DIST. OF N. C.

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
ASHEVILLE DIVISION
CIVIL NO. 2397

EDDIE W. PATTON, Petitioner,	)
v.	) MEMORANDUM OF DECISION
STATE OF NORTH CAROLINA, Respondent.	)

(Case Heard April 19, 1966 Opinion Filed July 20, 1966)

William W. Van Alstyne, Professor, Duke University School of Law, Durham, North Carolina, for Petitioner; Wade Bruton, Attorney General of North Carolina, and Theodore C. Brown, Jr., Staff Attorney, Office of Attorney General of North Carolina, Raleigh, North Carolina, for Respondent.

CRAVEN, Circuit Judge:

By establishing that he was unconstitutionally imprisoned, Eddie Patton won a new trial and, ironically, lost more of his liberty.

Patton was arrested on June 10, 1960, and has been imprisoned ever since. For lack of money to post bond, he stayed in jail in Bladen County from June 10, 1960, until his trial on October 26, 1960, when, without the assistance of counsel, he tendered a plea of nolo contendere to the felony of armed robbery. He was sentenced to serve a term of twenty years imprisonment in the State's prison and did not appeal.

Then came *Gideon v. Wainwright*, 372 U. S. 335 (1963). In April of 1964 Patton filed in the Bladen County Superior Court an application for a post-conviction hearing. His petition was denied, but, subsequently, the Supreme Court of North Carolina, in an order dated September 2, 1964, ordered a plenary hearing for Patton. On November 17, 1964, the Superior Court of Bladen County found as a fact that Eddie Patton, at the October, 1960 term, had requested the court to appoint counsel to represent him, and that the court had denied such request, and that at the time of the request Patton was an indigent person unable to employ counsel, and that he had not waived his right to counsel. As required by *Gideon*, the court concluded that Eddie Patton had been denied his constitutional rights "and that his sentence and the term for which he is now serving confinement is unlawful and should be set aside and declared null and void, and the said Eddie Walter Patton awarded a new trial." The North Carolina Prison Department surrendered Patton to the Sheriff of Bladen County. Bond was set in the amount of $12,000.00, and, for lack of it, Patton was confined in the Bladen County jail from about November 17, 1964, until about February 17, 1965, awaiting his second trial. Represented this time by counsel, he entered a plea of not guilty, but was convicted.

In February, 1965, Patton received the same, identical sentence, i.e., twenty years' imprisonment, that he had re-

ceived in October of 1960. The sentence and the trial judge's rationale of it appears in the transcript as follows:

> "COURT: Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years.
>
> "COURT: I am going to give you—I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the court is that the defendant be imprisoned in the State's prison for a term of 20 years, to be assigned to do labor as provided by law. He is in your custody, sheriff."

If Patton had not sought a new trial, he would have become eligible for parole in October, 1965.[1] Under the second sentence, he will become eligible for parole in February, 1970, i.e., some four years and four months after the original eligibility date. If ineligibility for parole be assumed and earned time factors ignored, he would have completed the first sentence in October, 1980; whereas, on the same assumptions, he will complete the second sentence in February, 1985.

As a result of having sought and obtained a new trial, Eddie Patton is worse off than he was before. It matters not to him whether what happened be verbalized as increased punishment or denial of credit for time served. Whether unjust or not, such a result is said to be lawful. The syllogism runs somewhat as follows:

(1) Patton did not have to seek a new trial and might well have been content with the sentence imposed upon him at the first trial in violation of his constitutional right to have the assistance of counsel.

(2) Since he chose to insist upon a new trial, if it turns out harmfully to him, it is his own fault and he should not be heard to complain. "A new trial . . .

carries hazards, as well as benefits." *State v. Merritt,* 264 N. C. 716, 142 S. E. 2d 687, at p. 691, (1965).

(3) "(I)n seeking and obtaining a new trial (Patton) must be deemed to have consented to a wiping out of all the consequences of the first trial." *State v. White,* 262 N. C. 52, 136 S. E. 2d at 208, (1964).

(4) "(H)e is not entitled as a matter of law to credit against the second sentence for time served under the original sentence", *Ibid.*, and is simply fortunate that the second trial judge gave him such credit—if he did.

(5) Since the maximum punishment for the offense is thirty years, Patton is fortunate that he received only twenty years at the second trial—even though such leniency results in his serving some four years and four months longer than he would have served. "The mere fact that different judges imposed different punishment does not invalidate the sentence imposed at the second trial", and the second judge may lawfully increase the sentence. *State v. Williams,* 261 N. C. 172, 134 S. E. 2d 163 at 165, (1964); (partially overruled in *State v. Wenver,* 264 N. C. 681; 142 S. E. 2d 633, but not so as to withdraw the application of the quoted statement to Patton.)

To the foregoing, Eddie Patton interposes the Fourteenth Amendment to the Constitution of the United States and insists that:

(a) He is entitled to credit for time served in prison under the first sentence—which credit has been effectively denied him. He contends that the trial judge's remarks (quoted hereinabove) about taking the time served into account kept the promise to the ear and broke it to the heart.

(b) He may not be sentenced to a longer term of im-

prisonment at the second trial than he received at the first trial, i.e., that the sentence at the first trial is a punishment ceiling.

(c) The second sentence of imprisonment was unconstitutionally motivated by religious bias of the presiding judge contrary to the First Amendment of the United States Constitution as made applicable to the states through the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

May this court properly consider these contentions?

JURISDICTION

Patton's petition for writ of habeas corpus was filed in this court on the 26th day of July, 1965, on a simple form used for processing the numerous applications received. Without benefit of counsel at that time, he alleged that he was unconstitutionally confined for the reasons mentioned in the order[2] summarily dismissing the application for the writ.

Patton appealed to the Court of Appeals for the Fourth Circuit, and his present contentions then became apparent for the first time. After consultation between the district judge and Chief Judge Haynsworth of the Court of Appeals for the Fourth Circuit, the case was remanded for further consideration. With the assistance of able counsel, the petition was amended to present the important contentions previously stated.

The power of a federal district court to consider a state prisoner's petition for writ of habeas corpus and to review the constitutionality of his state trial is conferred by Title 28 U.S.C.A. Section 2254. In conferring that jurisdiction upon the federal courts, the Congress has specifically provided that this court shall *not* grant the writ unless the state prisoner (1) has exhausted remedies available in the courts of the state, *or* (2) there is no available state corrective process, *or* (3) there are circumstances rendering the state

process ineffective to protect the rights of the prisoner.

North Carolina has a wholly adequate and enlightened procedure under which state prisoners may obtain from state courts a review of the constitutionality of their trial and imprisonment. N. C. G. S. Sections 15-217 to 15-222. Patton has not sought review of his second trial and sentence pursuant to the North Carolina Post-Conviction Hearing Act. Jurisdiction, if it exists, therefore depends upon "the existence of circumstances rendering such process ineffective." 28 U. S. C. A. Section 2254.

These circumstances exist by reason of prior decisions of the Supreme Court of North Carolina foreclosing in the state courts Patton's contentions that (a) he is entitled to credit for time served, and (b) that he cannot be harshly punished at a second trial. *State v. Williams,* 261 N. C. 172, 134 S. E. 2d 163, (1964); *State v. Anderson,* 262 N. C. 491, 137 S. E. 2d 823, (1964); *State v. White,* 262 N. C. 52, 136 S. E. 2d 205, (1964); *State v. Slade,* 264 N. C. 70, 140 S. E. 2d 723, (1965).

Recently the North Carolina Supreme Court, in *State v. Weaver,* 264 N. C. 681, 142 S. E. 2d 633, (1965), reexamined *Williams, White, Anderson,* and *Slade.* Mr. Justice Bobbitt, speaking for the court, said: "Decision on this appeal does not necessitate reconsideration of the decision in White as applied to the factual situation considered therein or to the later decisions based thereon, to wit, Anderson and Slade." *Weaver, supra,* 142 S. E. 2d at 637. Thus, those decisions were left standing. *Williams,* which had held flatly that the "contention that the judge was compelled to allow him credit for the period spent in prison before a valid trial was had is also without merit", *Id.,* 134 S. E. 2d at 165, was modified and overruled only to this extent: If the subsequent sentence plus the time already served under the invalid sentence exceed the statutory maximum provided for the offense, then the prisoner must be given credit for time served to the extent of the excess so that total time served will not be longer than the statutory maximum. Since Patton, under his present sentence, will serve not quite twenty-

five years and the statutory maximum sentence is thirty years, *Weaver* avails him nothing, and *Williams* controls as to him.

At the hearing in this court, the Staff Attorney of the Attorney General's office agreed with counsel for the petitioner that further pursuit of state remedies would, in view of these decisions, be in vain as to Patton's contentions with respect to credit for time served and harsher punishment.

Exhaustion of a state procedure to a foregone conclusion is not a prerequisite to federal jurisdiction. It is well established that under such circumstances jurisdiction exists in the federal district court to entertain the petition and to review the constitutionality of the trial and imprisonment. *Fay v. Noia,* 372 U. S. 391, (1963); *Irvin v. Dowd,* 359 U. S. 394, (1959); *Hunt v. Warden,* 335 F. 2d 936 (4th Cir., 1964); *Evans v. Cunningham,* 335 F. 2d 491 (4th Cir., 1964); *Thomas v. Cunningham,* 335 F. 2d 67 (4th Cir., 1964); *Thomas v. Cunningham,* 313 F. 2d 934 (4th Cir., 1963); *Crundler v. North Carolina,* 283 F. 2d 798 (4th Cir., 1960).

As one commentator has said: "'Application should not be necessary if it is reasonably clear that the state will refuse to take cognizance of the claim. The timely resolution of federal rights, as well as considerations of efficiency, should outweigh what can only be termed compulsive comity.'" Sokol, *A Handbook of Federal Habeas Corpus,* p. 122 (The Michie Company, Charlottesville, Virginia, 1965), quoting from Note, 39 N. Y. U. L. Rev. 78, 99, (1964).

Patton's contention that his second sentence is invalidated by religious bias of the trial judge has a different posture.[3]

This contention has not been presented to the state courts, nor has there been any showing made that special circumstances exist which would necessarily render state process ineffective. I, therefore, refuse to consider this contention because of the failure of the petitioner to exhaust presently available state remedies.

STARE DECISIS AND THE RELATIONSHIP BETWEEN STATE AND FEDERAL COURTS

Aside from the question of jurisdiction, no one-judge federal district court ought to lightly entertain an invitation to reject the considered judgment of his state's highest court on any question of law—constitutional or otherwise. Indeed, this court is bound to follow the interpretations of the North Carolina Supreme Court upon *state* substantive law. *Erie Railroad Co. v. Tompkins,* 304 U. S. 64, (1938). But, it is equally clearly established that, in habeas, state adjudication of federal constitutional law cannot be accepted as binding by the United States District Judge. *Brown v. Allen,* 344 U. S. 443, (1953).

"(T)he application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." *Brown, supra,* at 507. In *Townsend v. Sain,* 372 U. S. 293 at 318, (1963), the Court again set forth the rule: "It is the district judge's duty to apply the applicable federal law to the state court fact findings independently. The state conclusions of law may not be given binding weight on habeas."

There are those who sincerely view with alarm the foregoing mandate to the federal district judges and who fearfully envision a disruption of proper federal-state relations when a federal district judge obeys the command to independently decide constitutional questions without according binding weight to the expressed opinion of his own state supreme court. But those who are most alarmed overlook, I think, the ordinary sequence of events[4] in such a rare[5] situation.

As indicated in the margin, it seems to me extremely unlikely that a decision of a single district judge in conflict with his state supreme court would become effective until at least countenanced by the appropriate circuit court of appeals—if not the United States Supreme Court.

CREDIT FOR TIME SERVED AND HARSHER SECOND SENTENCE

Under the law of North Carolina, it is plain that the fortunate recipient of a new trial may be (1) denied credit for all time served in prison under the vacated judgment and sentence imposed at the first trial, *State v. White,* unless given the maximum sentence at the second trial, *State v. Weaver,* and/or (2) be given a longer sentence than that previously imposed, *State v. Williams,* so long at it is within the maximum permitted by the statute. The problem is not simply a theoretical one. A recent informal survey by the Duke Law Journal[6] indicates that the benefit of time already served has been effectively denied 72 per cent of the time (32 out of 44 cases) in sentences upon reconviction after a second trial in the Superior Court of North Carolina. The frequency of harsher punishment (whether by the device of refusing credit for time served, or by a longer sentence, or both) upon retrial doubtless intimidates persons held in prison under unconstitutional convictions from attempting to secure their right to a new trial.[7]

Is this bad? There are those who earnestly insist it is not; who say that *Gideon v. Wainwright,* 372 U. S. 335, (1963), is a distortion of the federal Constitution which, unfortunately, must be accepted as the law of the land but need not be embraced; that bothering with new trials in such cases simply wastes the time of overburdened criminal courts; that 99 out of 100 of those "unconstitutionally" confined are plainly guilty and will inevitably be found so in a new "constitutional" trial; that most of the prisoners who insist upon a new trial are merely trifling with the courts; that it is a good idea to discourage such "frivolous" petitions even though they rest on a constitutional basis.

Although I reject the underlying refusal to accept *Gideon,* I am not without understanding of the pragmatic viewpoint. No one who has sat a trial bench for long is unaware of the sense of frustration which accompanies the necessity of trying a case again to what an experienced judge knows, or thinks he knows, is a foregone conclusion. As stated by Justice Jackson, concurring in *Brown v. Allen,* 344 U. S. 443 at 537, (1953): "He who must search a haystack for a

needle is likely to end up with the attitude that the needle is not worth the search." The patience of Job is scarcely enough in such a situation.

But, such a pragmatic approach to the administration of criminal justice has within it at least one fatal flaw: however burdensome it may be to the courts, it is not a crime in America for one to insist upon his constitutional rights, and no person may constitutionally be punished for doing so.

Punishing a prisoner for petitioning for a new trial seems to me not dissimilar to punishing him for taking an appeal. Mr. Justice Devin, in *State v. Patton,* 221 N. C. 117, 19 S. E. 2d 142 at 144, (1942). spoke for the court with respect to the statutory right of appeal:

> "This right ought not to be denied or abridged, nor should the attempt to exercise this right impose upon the defendant an additional penalty or the enlargement of his sentence."

Mr. Justice Devin then quoted with approval from *Meaders v. State,* 96 Ga. 299, 22 S. E. 527:

> " 'The presumption is that the sentence first imposed was, in the opinion of the court, a proper punishment for the offense, and no further reason for changing it appears from the record than that stated in the bill of exceptions.' " *Patton, supra, Ibid.*

The court thereupon vacated a harsher sentence imposed by the trial judge after defendant's expression of his intention to appeal.

In *State v. White,* 136 S. E. 2d 205 at 207, the North Carolina Supreme Court indicated, without so holding, its adherence to the principle that due process forbids punishing a prisoner for obtaining a new trial. The court noted the absence of anything in the record to suggest that the trial

judge "imposed upon defendant a heavier sentence than he received at the first trial merely because he obtained a new trial."

In *Weaver, supra,* 142 S. E. 2d at 636, the North Carolina Supreme Court quotes with approval from *Lewis v. Commonwealth,* 329 Mass. 445: " 'It is hardly realistic to say that nine months in the State prison amount to nothing—that since the petitioner "should not have been imprisoned as he was, he was not imprisoned at all." *King v. United States,* 69 App. D. C. 10, 98 F. 2d 291, 293-294. Moreover, since there is no statute of limitation affecting the filing of petitions for writs of error in criminal cases, G. L. (Ter. Ed.) c. 250, Section 10, the time served before the reversal of the sentence might in some other case be so long that *glaring and intolerable injustice would result if the time served on a first sentenc should not be taken into account in imposing a second sentence.* (Italics mine.) It is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or *while it was being served.*' "

It is very difficult to reconcile the language and result of *Weaver* and *Patton* with what seems to be a wholly different rationale and wholly different results obtaining in *State v. Williams,* 261 N. C. 172, 134 S. E. 2d 163 (1964), (only partially overruled by *Weaver*), *State v. White,* 262 N. C. 52, 136 S. E. 2d 205 (1964), *State v. Anderson,* 262 N. C. 491, 137 S. E. 2d 823 (1964), and *State v. Slade,* 264 N. C. 70, 140 S. E. 2d 723 (1965).

In *Williams,* there was presented the shocking disparity of a *two* year sentence at the first trial followed by a *ten* year sentence at the second trial for the same offense. The Supreme Court of North Carolina affirmed in a per curiam opinion, stating, without citation of authority, that: "The mere fact that different judges imposed different punishment does not invalidate the sentence imposed at the second trial." *Id.* 134 S. E. 2d at 165. It was also held, without citation of authority, that the prisoner's contention that he

was entitled to "credit for the period spent in prison before a valid trial was had is also without merit". *Ibid.*

In *White,* the rationale of the court was that the petitioner was "deemed to have consented to a wiping out of all the consequences of the first trial," *Id.* 136 S. E. 2d 208, including verdict, judgment, and sentence. Therefore, the court said he was not entitled, as a matter of law, to credit against the second sentence for time served under the original sentence. But, such a rationale appears to be entirely inconsistent with the language from *Lewis v. Commonwealth,* quoted hereinabove and approved by the court in *State v. Weaver.* If, as Mr. Justice Bobbitt said in *Weaver,* "the hard fact of his actual service of sentence . . . cannot be ignored," *Id.* 142 S. E. 2d at 637, then it would seem that the rationale of *White* is destroyed. In this case, one of the consequences of the first trial is that Patton spent four years and four months in the penitentiary. *White* recognizes that a prisoner does not actually consent to having his imprisonment ignored by verbaliizng that he must be *deemed* to have consented. Thus are stated legal fictions. Four years and four months of a man's liberty ought not to be wiped out by legal fiction.

Reconciling the decisions as best I can, I believe North Carolina's highest court has interpreted the Fourteenth Amendment to the United States Constitution so as to apply to the fact situation presented here, as follows:

(1) Eddie Patton may constitutionally be more harshly punished at his second trial (*State v. White; State v. Williams*)—provided that he may not be more harshly punished for having appealed (*State v. Patton*) nor for having sought a new trial. (S *State v. White supra.* 136 S. E. 2d 207.)

(2) Because "glaring and intolerable injustice would result if the time served on the first sentence should not be taken into account in imposing a second sentence" (*Weaver, supra,* 142 S. E. 2d at

> 636), Eddie Patton is entitled to credit for time served, *but* he may be effectively denied credit for the four years and four months time that he served under the invalid first sentence because (except where the second sentence is for the statutory maximum) the court will presume that he was given credit for time served in the form of receiving a lesser sentence than the maximum which could have been imposed upon him. This presumption made it unnecessary in *Weaver* to reconsider *White, Anderson,* and *Slade.* The inability to make such a presumption in *Williams* (because the prisoner got the maximum sentence at the second trial) results in its being partially overruled, and the same inability accounts for the *Weaver* result. The imposition of the maximum sentence, as Mr. Justice Bobbitt put it in Weaver, "dispels any suggestion that the trial judge gave defendant credit for the punishment he already had received for the conduct charged in the bill of indictment. The hard fact of his actual service of sentence . . . cannot be ignored" *Id.* 142 S. E. 2d at 637—but only, apparently, in a case where he got the maximum sentence.

The effect of such a presumption—if there is one—being invoked at the appellate level is to deny Patton the right to question whether he in fact received credit for time served.

Perhaps the court has established no such presumption. But, if it has not, why does *Weaver* discuss and leave untouched *White, Anderson,* and *Slade,* and partially overrule *Williams.*

Absent such a presumption, why does *Weaver* seemingly support *White* by quoting from it: " 'There is nothing in the record to indicate whether or not Judge Latham in imposing sentence in the instant case gave or failed to give defendant credit for the time he had served under the original sentence in the first trial.' "? *Weaver,* 142 S. E. 2d at 637.

The distinction between *White* and *Williams* seems to be

simply this: Where the second trial judge has *not* given the prisoner the maximum sentence possible, it will be presumed that credit was given for time served even though the second sentence is longer than the sentence at the first trial; where the trial judge *has* given the maximum, no such presumption is possible.

I do not believe the practice of trial judges is so universally efficient and/or humane that it may be conclusively presumed on federal habeas corpus that whenever the maximum sentence is not imposed due credit has in every instance been given for time served.[8]

In a plenary evidentiary hearing of the scope required by *Townsend v. Sain,* 372 U. S. 293 (1963), I think Patton is entitled to inquire whether or not he has received credit for time served and is not barred from doing so by any state presumption that may be thought to arise out of the leniency of the second trial judge in not imposing the maximum sentence permitted by law.

The United States Supreme Court has "consistently held that state factual determinations not fairly supported by the record cannot be conclusive of federal rights." *Townsend v. Sain, supra,* at 316.

Thus, we come to the heart of the question: the motivation of the second trial judge. Why are so many prisoners[9] more harshly punished and/or denied credit for time already served? One may strongly suspect—as does Patton[10] that it is to discourage applications for new trials thought to be frivolous. But it is not enough to suspect.

What was the motivation of the experienced trial judge who effectively imposed upon Eddie Patton substantially greater punishment than he would have suffered if he had not asked for a new trial? I do not know. If a trial judge imposed a harsher sentence to discourage petitions for new trials, would he likely be candid enough to so state in the record? I have not heard of such an instance. Does that mean

it has never been done or never done by a sufficiently candid judge? Is it possible that a trial judge overburdened with congestion in the criminal courts might unconsciously or subconsciously be motivated by such a purpose?

In view of the heavy deference accorded the sentencing judge's determination of time to be served, it is rather surprising that so often the second sentencing judge (on a new trial) does not defer to the first judge's determination but, instead, imposes a longer effective sentence. Changing the sentence at the second trial seems inconsistent with our tradition that a judge's sentence is almost sacrosanct—even to the point of being invulnerable on appeal.[11] Such a practice also collides somewhat with the time-honored maxim that "there is no appeal from one superior court judge to another."[12]

Whatever may be said of the plenary power of the second trial judge to determine sentences, I think all will agree that sentences should rest on a rational and not an arbitrary basis. I do not know why Patton was more harshly sentenced at the second trial, but I presume with Mr. Justice Devin "'that the sentence first imposed was, in the opinion of the court, a proper punishment for the offense. . . .'" *State v. Patton, supra,* 19 S. E. 2d at 144. I have carefully searched the record of the second trial and find nothing in it explanatory of the harsher punishment.[13] In *State v. White, supra,* the North Carolina Supreme Court said that there was nothing in the record to suggest that the second judge imposed upon defendant a heavier sentence because he obtained a new trial. The corollary of that proposition is that in this case before me there is nothing in the record to suggest any other reason for the imposition of heavier punishment.

To put upon the prisoner the burden of proving improper trial judge motivation is like granting him the opportunity to move Parnassus with a spoon. Not even another trial judge has the omniscience to divide his brother's motivation. Since the presumption is that the first sentence imposed was a proper punishment for the offense, it is not unreasonable

to put upon the state in a Townsend-type plenary evidentiary hearing the burden of showing to the federal district judge that facts sufficiently different from those presented at the first trial were presented at the second trial which rationally support the imposition of a heavier sentence—if harsher punishment was imposed. It will not unduly burden the state to require the establishment on federal habeas of a rational predicate to support the imposition of harsher punishment, e.g., that the prisoner misled the first trial judge as to his prior criminal record, or, e.g., that he has been such a consistent troublemaker during the time spent in prison as to indicate that rehabilitation cannot be accomplished within the limitation of the first sentence.

It is not novel in the federal courts to put upon him who has information the burden of producing it. *Chambers v. Hendersonville City Board of Education,* ..... F. 2d ..... (4th Cir. June 6, 1966), and cases cited therein.

This is not to say at all that the second trial judge anymore than the first one, must have articulated his reasons for imposing sentence. To do so is sometimes extremely difficult, if not impossible. Trial judges have enough to do without being saddled with the burden of rationalizing every sentence on the record in open court.

Since the form of Patton's sentence may be considered either a denial of credit for time served or an imposition of harsher punishment, it is necessary to rule on both questions: they are but jaws of the same vice.

In my opinion, denial of credit at a second trial for time served while in the defacto status of state prisoner is so fundamentally unfair as to constitute a violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the Constitution. I am supported in this conclusion by Mr. Justice Bobbitt's words that "(t)he hard fact of his actual service of sentence . . . cannot be ignored." *Weaver, supra,* 142 S. E. 2d at 637. In my judgment, it cannot be ignored in any case—whether or not the maximum

sentence may have been imposed at the second trial. It is held that at a second or subsequent trial credit for time served under a previous invalid sentence must be given. Cf. *Dowd v. United States*, 340 U. S. 206 (1961); *Cochran v. Kansas*, 316 U. S. 255 (1942); see *United States v. Boyce*, 352 F. 2d 786 (4th Cir. 1965).

On the facts of this case—where there is not one scintilla of evidence in the record to rationally support the imposition of a harsher penalty—the imposition of the same is held to be so fundamentally unfair as to violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution. See: *United States v. Wiley*, 278 F. 2d 500 (7th Cir., 1960); *United States v. Boyce, supra.* Harsher punishment may constitutionally be imposed at a second trial—but there must be a reason for it, and the reason must be discernable.

Protection of the individual from arbitrary action is the very essence of due process of law. *Slochower v. Board of Education of New York*, 350 U. S. 551 (1956).

This decision may be put upon yet another basis. If it be assumed that the motivation of the second trial judge was above reproach and that the imposition of heavier punishment and/or the failure to give credit for time served was motivated by a proper concern for the protection of society and not by any purpose to punish the prisoner for having sought and obtained a new trial, the inescapable fact remains that the effect of what the second trial judge did (Patton is four years and four months worse off) is to inhibit the right to petition for new trial. This is so for the simple reason that where the record discloses no colorable reason for harsher punishment, prisoners and others will inevitably conclude — whether rightly or wrongly — that Patton was punished for obtaining a new trial.[14] It is not enough for trial judges to be rightly motivated; they must be credited for being so or the administration of justice will suffer. Regardless of the trial judge's motivation, and assuming it to be proper, I am of the opinion that the imposition of a

harsher penalty (whether by denial of credit for time served or by increased sentence) without there being contained in the record any facts tending to rationally support the imposition of such a penalty inhibits the right to petition for a new trial and unconstitutionally conditions that right. *Fay v. Noia*, 372 U. S. 391 (1963); *Green v. United States*, 355 U. S. 184 (1957); *Hetenyi v. Wilkins*, 348 F. 2d 844 (2d Cir. 1965); *People v. Henderson*, 60 Cal. 2d 482, 386 F. 2d 677 (1963).

Since the protection of society was presumably accomplished sufficiently by the imposition of the first twenty year sentence, conditioning the right of obtaining a new trial upon fictional consent to be more harshly punished cannot be justified. There is no compelling unprotected interest of society to support a limitation of the constitutional right to seek and obtain a new trial. See: *NAACP v. Alabama ex rel. Flowers*, 377 U. S. 288 (1964); *Sherbert v. Verner*, 374 U. S. 398 (1963); *Cramp v. Board of Public Instruction*, 368 U. S. 278 (1961); *Greene v. McElroy*, 360 U. S. 474 (1959); *Speiser v. Randall*, 357 U. S. 513 (1958); *Slochower v. Board of Higher Education*, 350 U. S. 551 (1956); *Wieman v. Updegraff*, 344 U. S. 183, 192 (1952); *Hannegan v. Esquire, Inc.*, 327 U. S. 145 (1946); *Hague v. CIO*, 307 U. S. 496 (1939); *Frost Trucking Co. v. R. R. Comm'n.*, 271 U. S. 583 (1926); *Goldsmith v. Board of Tax Appeals*, 270 U. S. 117 (1926); *Terral v. Burke Construction Co.*, 257 U. S. 529 (1922); *Western Union Telegraph Co. v. Kansas*, 216 U. S. 1 (1910); *Barron v. Burnside*, 121 U. S. 186 (1887); see also Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Merrill, *Unconstitutional Conditions*, 77 U. Pa. L. Rev. 879 (1929); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

In my opinion, the North Carolina Supreme Court adheres to the basic constitutional principles enunciated herein: that a prisoner may not be denied credit for time served, nor punished for obtaining a new trial.

If the re[illegible] obtained in this court is different from what

would obtain in a state court, it is, in my opiinon, because of differing adjective law in the federal and state systems rather than fundamentally different conceptions of due process and equal protection.

Even so, the Stae Attorney General may consider this decision in conflict with certain decisions of the North Carolina Supreme Court. Because of that possibility, and out of respect for my own state supreme court, and on my own motion, the order I am about to enter will be stayed for a period of ninety (90) days, within which time the Attorney General of the State of North Carolina may prosecute his appeal to the Court of Appeals for the Fourth Circuit, if so advised.

An appropriate Writ of Habeas Corpus will be entered requiring that the Director of Prisons treat the commitment as if the sentence was passed October 26, 1960, rather than February 1965, so that Patton will receive credit for the actual time served by him under the invalid sentence and escape the service of any penalty more harsh than the twenty year sentence originally imposed.

This 19th day of July, 1966.

/s/ J. BRAXTON CRAVEN, JR.

1. N. C. G. S. Section 148-58 provides that a prisoner shall be eligible for parole after serving a fourth of a determinate sentence, i.e., five years of the twenty.

2. The entire order read as follows.

"Petitioner was successful in vacating his first trial for armed robbery, and he seeks now to have reviewed his second trial for the same offense. The grounds alleged for relief are double jeopardy, tried in prison uniform, and right to face one's accusors. North Carolina does not have a prison uniform unless khaki clothing can be termed such. There is nothing to the allegation with respect to double jeopardy, and the other ground is so vague as to be of no effect.

"The petition is dismissed.

"The Clerk will certify a copy of this Order to the petitioner and to the Attorney General of North Carolina.

"This 16th day of August, 1965."

3.

This contention with respect to religious bias arises out of the following colloquy between court and counsel at time of sentencing (taken verbatim from the transcript):

"Defendant: Well, to be the way I would put it, I felt like I had life anyway, and not any hopes of getting out. And a person without is—well, I don't know whether you would—I know that you couldn't understand how it would be without hope.

"The Court: No, sir. I am not without hope, because I am a Christian, are you?

"Defendant: I believe there is a God. I am not a Christian . . . .

"The Court: . . . .Then I can see maybe why you are without hope. (pause) Let the jury come in.

"Whereupon, the Court took the verdict of the jury as to another trial had at this Session of Court, following which:'

"The Court: Mr. Patton, no one can have any hope who is without Christ.

"Defendant: If your Honor would let me explain . . . .

"The Court: . . . . Yes, sir, I will.

"Defendant: I don't believe in penitentiary and jail as a Christian. I do believe there is a God, and I believe that either side—there was a thief on either side—and both of them knew they were in the presence of God. The first one stated to him, 'You being the Christ, call your angels and get us down. You said he would give you charge over them.' And the other one said, 'Antagonize this man not. You and myself are justified in being here, and he is unjustly accused.' He said, 'Remember me when you come into your kingdom.' He said, 'This day you

will dwell with me in Paradise.' Well, they both (some unintelligible) One was interested in soul salvation; the other one was only interested in getting down. That is why I say I don't believe in jail house or penitentiary religion. If I had anything to say to God, I would throw up my head and do it humbly, and not for show. Is there anything else you would like to ask me?

"The Court: No. You are the one that is telling me anything you want to. I am the one who is going to do this sentencing. Anything you want to tell me, you tell me. You have told me you didn't have any hope. I told you that every man without Christ has no hope, but I do have hope because I am a Christian.

"Defendant: If Your Honor pleases, I said I didn't have any help. All I have got is hope. I base that on the time I have already built."

4.

Would not the sequence of events occur somewhat as follows?:

(1) Declaration of constitutional law by state supreme court with denial of relief to state prisoner.

(2) Writ of habeas corpus in federal district court and decision contrary to state supreme court with order commanding release of the prisoner.

(3) Appeal by the state attorney general to the appropriate circuit court of appeals.

(4) The federal district court would then, on motion, presumably stay its order until the appeal could be heard and determined.

(5) If the district judge failed to stay his own order, petition by the state attorney general to a member of the appropriate circuit court of appeals to do so.

(6) Decision by the appropriate circuit court of appeals either reversing the district judge and lining up with the state supreme court, or affirming the district court.

(7) In the latter event, petition for cert. by the state attorney general to the United States Supreme Court on the ground

of conflict between a state supreme court and a circut court of appeals.

5.

As a practical matter, this is the first habeas corpus petition out of 136 considered by me in the past five years which seriously presents the problem of possible conflict of law between state and federal courts. I have granted 23 writs since March, 1963. All have been granted on constitutional grounds with which the Supreme Court of North Carolina is in accord. The Attorney General of North Carolina has not appealed any of the 23 decisions granting the writ.

6.

Note, *Increased Sentence and Denial of Credit on Retrial Sustained under Traditional Waiver Theory*, 1965 Duke L. J. 395.

7.

A prisoner's fear of the hazards of a new trial is graphically stated in the following letter which came as a sequel to the issuance of the writ in *Perkins v. State of North Carolina*, 234 F. Supp. 333 (W.D.N.C., 1964). The successful petitioner wrote me, in part: (spelling his, italics mine)

"Dear Sir:

"I am in the Mecklenburg County jail. Mr. ..... chose to re-try me as I knew he would.

* * * *

"Sir; the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and *now I am to be tried again and with all probility I will receive a heavier sentence then before as you know sir my sentence at the first trile was* 20 to 30 years. *I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.*

"Your Honor, I don't want a new trile I am afraid of more time. . . .

"Your Honor, I know you have tried to help me and God knows I apreceate this but *please sir don't let the state re-try me if there is any way you can prevent it.*

"Very truly yours"

In response to the foregoing letter, I wrote the petitioner, in part, as follows:

> "There is nothing whatsoever that I or any other federal judge can do to prevent the State of North Carolina from re-trying you . . . .
>
> * * * *
>
> "If the Attorney General for the State of North Carolina *consented,* I would then be able to vacate my Order requiring your release and/or re-trial, and I would have no objection to doing so. From previous experience with a similar request, I am extremely doubtful the State would consent. If you and your lawyer, in whom I have confidence, want to attempt to get the consent of the Attorney General, you may, of course, do so, with the understanding that I would have no objection and will vacate the Order if the State consents to it."

Retrial eventuated, and the petitioner was acquitted.

8.

At the May, 1966 term of the United States District Court in Asheville, I sentenced some eight or ten defendants to relatively short terms—in most instances far less than the statutory maximum—and simply forgot to give some of them credit for time spent in jail awaiting trial. I later corrected my oversight. But a state judge cannot reduce a sentence after the term ends.

9.

See Note 6, *supra.*

10.

Note 7, *supra,* documents the suspicion and fear of another prisoner.

11.

There is no appellate review of state sentences in North Carolina, nor even yet in the federal courts. On October 22, 1965, Senator Hruska of Nebraska introduced Senate Bill 2722 to provide for the appellate review of sentences imposed in criminal cases arising in the district courts of the United States.

12.

Some trial judges feel very strongly that their sentences should not be changed by other trial judges. About a year ago one of the superior court judges of North Carolina aired publicly in the newspapers his deep resentment of another superior court

judge modifying during the second week of a term sentences imposed by the first judge the previous week.

13.

At the time of the second trial, Patton was an honor-grade prisoner. There is nothing in the record to indicate that the second trial judge was given more or different information about Patton than was available to the first trial judge.

14.

Having myself been accused of punishing a prisoner for obtaining a new trial, I have some empathy for the second trial judge. See: *United States v. Boyce*, 352 F. 2d 786, (1965).

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 11,005.

Eddie W. Patton,
Appellee,

versus

State of North Carolina,
Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT ASHEVILLE. J. BRAXTON CRAVEN, JR., DISTRICT JUDGE.

(Argued February 6, 1967. Decided June 14, 1967.)

Before SOBELOFF, J. SPENCER BELL* and WINTER, Circuit Judges.

Theodore C. Brown, Jr., Staff Attorney, Office of the Attorney General of North Carolina, (T. Wade Bruton, Attorney General of North Carolina, on brief) for Appellant, and William W. Van Alstyne (Court-assigned counsel) for appellee.

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* Judge Bell participated in the hearing and concurred in the disposition of the case but died before the opinion was prepared.

SOBELOFF, Circuit Judge:

The question raised by this appeal is whether a defendant may be sentenced to a longer term of imprisonment at his second trial than he received after his first conviction, vacated on constitutional grounds.

Unrepresented by counsel, the petitioner, Eddie W. Patton, was tried in October, 1960 and convicted of armed robbery after a plea of nolo contendere, entered at the close of the State's evidence. He was sentenced to prison for a term of twenty years. No appeal was taken, but in April 1964, Patton applied for a state post-conviction hearing, and on the basis of the Supreme Court's landmark decision in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), was awarded a new trial.

Patton remained in custody, and on February 17, 1965, after tendering a plea of not guilty, he was again convicted by jury on the original indictment. This time he had the assistance of counsel, who called the court's attention to the fact that the defendant had been continuously imprisoned from June 10, 1960 and had already served nearly five years for the offense. Although the trial judge paid lip service to the idea of crediting Patton with that portion of the initial twenty-year sentence already served, he actually increased Patton's punishment by imposing, in effect, a twenty-*five*-year sentence and then deducting five years for the time served.[1] Thus, as a result of seeking and obtaining a new trial, the prisoner, who originally would have been eligible for parole in October 1965, now it is agreed, will not become eligible until February 1970.

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1 "THE COURT: Before I announce punishment, I will take into consideration the fact that he has served four years, or nearly five years.

* * *

"THE COURT: * * * I would give you five more years than what I am giving you, but I am allowing you credit for the time that you have served. Judgment of the Court is that the Defendant be imprisoned in the State's Prison for a term of twenty years * * *."

Regardless of whether the action of the sentencing judge is verbalized as a twenty-year sentence without credit for the five years already served, or as a twenty-five-year sentence with credit, the practical effect of the second judge's sentence is to compel the defendant to serve five years longer to become eligible for parole, than he would have been required to serve had he not asserted his constitutional right to a fair trial.

Patton applied in August 1965 to the District Court for a writ of habeas corpus, contending that a harsher sentence following a second conviction for the same offense, after the initial conviction has been vacated on constitutional grounds, is a denial of due process of law; is inconsistent with the prohibition against double jeopardy; and is a denial of equal protection of the law. The District Court held Patton's sentence unconstitutional on the ground that the increased punishment violated the due process and equal protection clauses of the Fourteenth Amendment. *Patton* v. *North Carolina,* 256 F. Supp. 225 (W.D.N.C. 1966).

I. *Exhaustion of State Remedies*

The State has misconceived the import of Patton's arguments. It interprets his contention to be that the second trial judge, in imposing a more severe sentence, was motivated by prejudice because of the defendant's successful attack on the initial conviction. The State's position on this appeal is that such an allegation has never been presented to the state courts, and it reasons that Patton having failed to exhaust available state remedies or to show that circumstances existed rendering the state process ineffective to protect his rights, the District Court lacked jurisdiction under 28 U.S. C. § 2254. The District Judge carefully reviewed the relevant North Carolina cases, however, and concluded that the

effect of the opinions of the state supreme court is to hold that a defendant is not entitled to credit for time served and may receive an increased sentence (unless the subsequent sentence plus the time already served under the invalid first sentence should exceed the statutory maximum).[2] We share the District Court's view that since further resort to the North Carolina courts would be futile, it is not required.[3]

II. *Due Process*

The simplistic rationale traditionally offered for denying credit and permitting a harsher sentence at a second trial is that the prisoner, by successfully attacking his initial conviction, has "voided" or "wiped out" all consequences of that conviction—including the sentence imposed by the first judge and any time served under that sentence.[4] In *State* v.

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[2] State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965); State v. Slade, 264 N.C. 70, 140 S.E.2d 723 (1965); State v. Anderson, 262 N.C. 491, 137 S.E.2d 823 (1964); State v. White, 262 N.C. 52, 136 S.E.2d 205 (1964); State v. Williams, 261 N.C. 172, 134 S.E.2d 163 (1964).

[3] Our conclusion is strengthened by the recent decision in State v. Pearce, ... N.C. ....., 151 S.E.2d 571 (1966), decided since the District Court's action. In that case, the defendant's sentence was increased following his second conviction, even though "the evidence on the new trial was not essentially different" from that adduced at the original trial. In his appeal to the state supreme court, the defendant relied on Judge Craven's opinion here under review, to support his argument that any increase in the punishment imposed after a second conviction was in effect a penalty for seeking review of an invalid conviction, and a violation of his constitutional rights. The Supreme Court of North Carolina, however, declined to follow that opinion, stating flatly that "we adhere to our former decisions." *Id.* at ....., 151 S.E.2d at 572.

[4] Plainly, the trial court regarded Patton's successful attack on his original unconstitutional conviction as a waiver of the benefit of nearly five years' imprisonment.

> "THE COURT: Are you referring about the prior sentence that was imposed on you?
> DEFENDANT: Yes, sir.
> THE COURT: That was wiped off.
> DEFENDANT: Yes, I understand that.

White, 262 N.C. 52, 136 S.E.2d 205 (1964), the North Carolina Supreme Court stated that a defendant

> "is not entitled as a matter of law to credit against the second sentence for time served under the original sentence. The rationale of the decisions seems to be that the defendant in seeking and obtaining a new trial *must be deemed to have consented to a wiping out of all the consequences of the first trial.*"[5]

262 N.C. at ...., 136 S.E.2d at ..... (Emphasis supplied.)

The principle of fair dealing which impels judges in passing sentence to take into account the time a defendant was deprived of his liberty while awaiting trial, *Dunn* v. *United States,* .... F.2d. .... (4th Cir. Feb. 24, 1967), insists

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[5] It is noteworthy, however, that even the North Carolina Supreme Court has, on occasion boggled at this Draconian doctrine. In State v. Weaver, 264 N.C. 681, 142 S.E.2d 633 (1965), the court quoted with approval from an opinion by the Massachusetts Supreme Court, Lewis v. Commonwealth, 329 Mass. 445, 108 N.E.2d 922 (1952), as follows:

> "It is hardly realistic to say that nine months in the State prison amount to nothing—that since the 'petitioner should not have been imprisoned as he was, he was not imprisoned at all.' [Citation omitted.] Moreover, * * * the time served before the reversal of the sentence might be so long that glaring and intolerable injustice would result if the time served on a first sentence should not be taken into account in imposing a second sentence. It is not even technically correct to say that the first sentence must now be deemed to have been a nullity. It was not a nullity when it was imposed or *while it was being served.*"

Id. at ...., 142 S.E.2d at 636. (Emphasis supplied by North Carolina Supreme Court.) The North Carolina court added that "the hard fact of his [Weaver's] actual service of sentence * * * cannot be ignored." *Id.* at ....., 142 S.E.2d at 637. *Weaver,* however, was a case in which the second sentence imposed on the defendant was the maximum allowable under the statute, so that added to the time already served under the invalid first sentence, the punishment exceeded the statutory maximum.

> THE COURT: Mr. Patton, as your motion, because you moved that it be—and alleged and the Court found that your constitutional rights had been violated upon your motion, and that was all done away with. We are now confronted with a new day."

even more inexorably that he shall not be finessed out of credit for time he was forced to serve under an invalid sentence. The trial and conviction may be voided on appeal, but the time illegally exacted by the unconstitutional sentence is an indisputable fact. It is grossly unfair for society to take five years of a man's life and then say, we now acknowledge that this should not have happened, but we will set everything right by refusing to recognize that it did happen. This is an unworthy pretense. Courts should not be astute to fashion legal fictions to attain unjust ends.[6]

The risk of a denial of credit or the risk of a greater sentence, or both, on retrial may prevent defendants who have been unconstitutionally convicted from attempting to seek redress.[7] For this reason, the District Court declared that

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[6] Judge Edgerton, in King v. United States, 98 F.2d 291 (D.S. Cir. 1938) characterized as "in the vein of The Mikado" the government's arguments that because the initial sentence was void, an accused "has served no sentence but has merely spent time in the penitentiary," and, that since the defendant "should not have been imprisoned as he was, he was not imprisoned at all." He facetiously suggested as logical corollaries to such arguments that the accused should also be "liable in quasi-contract for the value of his board and lodging, and criminally liable for obtaining them by false pretenses." *Id.* at 293-94.

[7] Judge Craven himself has received a letter which vividly illustrates a prisoner's fear of obtaining an increased sentence following a new trial:

> "Dear Sir:
>
> I am in the Mecklenburg County jail. Mr. ..... chose to re-try me as I knew he would.
>
> * * *
>
> Sir the other defendant in this case was set free after serving 15 months of his sentence, I have served 34 months and now I am to be tried again and with all probability I will receive a heavier sentence then before as you know sir my sentence at the first trile was 20 to 30 years. I know it is usuelly the courts prosedure to give a larger sentence when a new trile is granted I guess this is to discourage Petitioners.
>
> Your Honor, I don't want a new trile I am afraid of more time * * *.
>
> Your Honor, I know you have tried to help me and God knows I appreciate this but please sir don't let the state re-try me if there is any way you can prevent it.
>
> Very truly yours"

256 F. Supp. at 231 n.7. (Italics omitted.)

predicating Patton's constitutional right to petition for a fair trial on the fiction that he has consented to a possibly harsher punishment, offends the due process clause of the Fourteenth Amendment.[7a] It would confront the prisoner with the unhappy choice of either abandoning his constitutional right to a fair trial and serving out his prison term under the invalid sentence, or exercising that right under the hazard, in the event of a second conviction, of being treated as though the years of imprisonment already served had never occurred.[8]

This is like the "grisly choice" discountenanced in *Fay* v. *Noia,* 372 U.S. 391 (1963). "The law should not, and in our judgment does not, place the defendant in such an incredible dilemma." *Green* v. *United States,* 355 U.S. 184 (1957).[9] North Carolina deprives the accused of the con-

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[7a] *Cf.* State v. Wolf, 46 N.J. 301, ..., 216 A.2d 586, 590-91 (1966). There the defendant, convicted of first-degree murder with a jury recommendation of life imprisonment, succeeded in obtaining a reversal on the basis of certain errors (non-constitutional in nature) committed at the trial. In holding that the State was barred on retrial from again seeking the death penalty, the Supreme Court of New Jersey found it unnecessary to decide whether the double jeopardy clause of either the federal or the state constitution, or the due process clause of the Fourteenth Amendment, was applicable. The unanimous decision was based instead on certain "procedural policies" which were "of the essence of the administration of criminal justice."

[8] That this is a very real risk and not merely hypothetical is indicated by an informal survey conducted by the Duke Law Journal which revealed that in 72% of the retrials occasioned by the denial of counsel at the first trial, credit for time already served was effectively denied. Note, *Increased Sentence and Denial of Credit on Retrial Sustained Under Traditional Waiver Theory,* 1965 DUKE L.J. 395, 399 n.25.

[9] In *Green,* it was argued that the defendant had "waived" the benefit of his first trial, in which he escaped conviction for a higher offense, as a condition for appealing his conviction of the lesser one. See United States *ex rel* Hetenyi v. Wilkins, 348 F.2d 844, 859 (2d Cir. 1965), where an analogous argument was rejected with the observation that it ignore[s] the elementary psychological realities" and presumes "a barter theory of fairness;" and United States

stitutional right to a fair trial, then dares him to assert his right by threatening him with the risk of a longer sentence. It may not exact this price. Enjoyment of a benefit or protection provided by law cannot be conditioned upon the "waiver" of a constitutional right.[10]

Indeed, this Circuit has already held it impermissible to force upon an accused the risk of more severe punishment as a condition for securing a constitutional right. In *United States* v. *Walker,* 346 F.2d 428 (4th Cir. 1965), the defendant was initially sentenced in his absence. When he successfully attacked the sentence on this ground, he was resentenced to a longer term. Judge Bryan, speaking for the court, criticized the trial judge's disregard of the original sentence:

> "[T]he import of the [District] Court's ruling was to condition his Constitutional right to seek correction upon the risk of another sentence, then unforeseeable in nature and extent. Thus, though not so intending, the Court potentially penalized him for asserting the

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v. Walker, 346 F.2d 428 (4th Cir. 1965), declaring that a defendant's motion to vacate his defective sentence could not be considered a waiver.

> "In reality, whatever his words to the Court, Walker obviously did not desire to chance a greater term. If in law his wish 'to vacate' embraced that unnatural decision, he should not be held to it."

346 F.2d at 431.

The Supreme Court has on numerous occasions articulated its concern that access to post-conviction remedies be unfettered. See, *e.g.,* Fay v. Noia, *supra;* Douglas v. California, 372 U.S. 353 (1963); Green v. United States, *supra;* Griffin v. Illinois, 351 U.S. 12 (1956); Chicos v. Indiana, ... U.S. ....., ... (Nov. 14, 1966) (Fortas, J. dissenting); United States v. Ewell, 383 U.S. 116, 126 (1966) (Fortas, J., dissenting).

[10] See, *e.g.,* Lamont v. Postmaster General, 381 U.S. 301 (1965); Griffin v. California, 381 U.S. 609 (1965); Sherbert v. Verner, 374 U.S. 398 (1963); Speiser v. Randall, 357 U.S. 513 (1958); Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926). See also Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant,* 74 YALE L.J. 606 (1965); Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960).

> privilege. This law forbids * * *. [Citing *Green* v. *United States*, 355 U.S. 184 (1957).]
>
> * * *
>
> It [the second, harsher sentence] was, in sum, the product of a procedure which could prove either deterring or punitive of an insistence on Constitutional privileges."[11]

346 F.2d at 430-31.

The District Court held that Patton's punishment could not be increased unless evidence justifying a harsher sentence appeared in the record, and that the State must bear the burden of showing that such facts were introduced at the second trial, since "where the record disclosed no colorable reason for harsher punishment," the effect would be to inhibit the constitutional right to seek a new trial.[12] 256 F. Supp. at 236. We agree with the District Court that it is an impossible task for the prisoner to prove improper motivation of the trial judge. It is equally impossible, and most distasteful, for federal courts to pry into the sentencing judge's motivation to ascertain whether vindictiveness played a part.

We do not think, however, that a defendant's rights are adequately protected even if a second sentencing judge is restricted to increasing sentence only on the basis of new evidence. We are in accord with the First Circuit, which has recently held that a sentence may not be increased fol-

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[11] "Denying a benefit because of the exercise of a right in effect penalizes that exercise, making it tantamount to a crime. Punishing constitutionally protected activities seems clearly a violation of substanive due process." Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595, 1599-1600 (1960).

[12] One commentator has noted that the strongest reason for denial of credit is the desire of courts to discourage appeals. Whalen, *Resentence without Credit for Time Served: Unequal Protection of the Laws*, 35 MINN. L. REV. 239, 248 (1951).

lowing a successful appeal, even where *additional* testimony has been introduced at the second trial.

> "The danger that the government may succeed in obtaining more damaging evidence on a retrial is just as real as the danger, for example, that the judge on his own may wish to reconsider, unfavorably to the defendant, the factors which led to his original disposition. We think that there must be repose not merely as to the severity of the court's view, but as to the severity of the crime."[12a]

Marano v. *United States,* .... F.2d ...., ... (1st Cir. Mar 23, 1967). *Contra, Starner* v. *Russell,* 35 U.S.L. WEEK 2706 (3rd Cir. May 25, 1967).

An analogy may be drawn between the solution adopted by the Supreme Court in *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), in response to the problems raised by *Betts* v. *Brady,* 316 U.S. 455 (1942), and the issue here.[13] The Court had earlier held in *Betts* that whether the conviction of an unrepresented defendant was a denial of due process depended on whether "special circumstances" existed which would, in a particular case, "constitute a denial of fundamental fairness." 316 U.S. at 462. But in *Gideon,* there was forthright recognition that to require such a showing, in an area in which the chance of undetectable prejudice is so

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[12a] *Marano* held flatly that it would be improper for the court to increase the sentence on the basis of additional testimony which came out at the new trial, but suggested by way of dictum that in some circumstances it might not be "inappropriate for the court to take subsequent events [as disclosed in a new pre-sentence report] into consideration, both good and bad." As to the dictum, we do not agree, for the reasons developed in the text of this opinion.

[13] *Cf.* Note, *The Defendant's Challenge to a Racial Criterion in Jury Selection: A Study in Standing, Due Process and Equal Protection,* 74 YALE L.J. 919 (1965).

great, was too heavy a burden to cast upon an accused. The controlling point was not that the absence of counsel necessarily prejudiced the defendant, but that is created the *opportunity* for unfairness. For this reason, the *Gideon* Court made the presumption of injury irrebutable.

Similarly, improper motivation is characteristically a force of low visibility. In order to prevent abuses, the fixed policy must necessarily be that the new sentence shall not exceed the old. Seldom will this policy result in inadequate punishment. Against the rare possibility of inadequacy, greater weight must be given to the danger inherent in a system permitting stiffer sentences on retrial—that the added punishment was in reaction to the defendant's temerity in attacking the original conviction. Even the *appearance* of improper motivation is a disservice to the administration of justice.

III. *Equal Protection*

The equal protection clause of the Fourteenth Amendment likewise compels a rule barring a sentence in excess of the one invalidated, and this protection extends even to one seeking to avail himself of a state's post-conviction remedies because of non-constitutional errors in the original trial.[14]

North Carolina strictly forbids an increase in a defendant's sentence after the trial court's term has expired and service of sentence has commenced.[15] Thus the threat of a heavier sentence falls solely on those who utilize the post-conviction procedures provided by the State. If the State wishes to institute a system permitting upward revision of

[14] See State v. Whaley, ... F.2d ....., *infra*, decided this day.

[15] *E.g.*, State v. Lawrence, 264 N.C. 220, 141 S.E.2d 264 (1965); State v. McLamb, 203 N.C. 442, 166 S.E. 507 (1932); State v. Warren, 92 N.C. 825 (1885).

sentences, it must proceed upon a rational basis in selecting the class of prisoners it will subject to this threat. It may not discriminate in this regard against those who have exercised the right to a fair trial. This is an arbitrary classification offensive to the equal protection clause.[16] As the court-appointed counsel for the defendant has put it:

> "The risk of a harsher sentence is borne exclusively by those who pursue some post-conviction remedy. Yet there is no reason to suppose that the original sentences of this group are any more likely to warrant review as a class than the sentences of other convicts who are not subject to the same risk. The vulnerable class appears

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[16] See McLaughlin v. Florida, 379 U.S. 184 (1964), which declares that classification

> "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

Id. at 190 [quoting from Gulf, C. & S. F. R. Co. v. Ellis, 165 U.S. 150, 155 (1897)]. See also, *e.g.*, Morey v. Doud, 354 U.S. 457 (1957); Skinner v. Oklahoma, 316 U.S. 535 (1942).

The issue has been phrased by one writer as follows:

> "Is there any rational justification for punishing *this* defendant substantially more than others who committed the same offense, simply because *this defendant* was not given a fair trial or was not properly sentenced the first time?"

Whalen, *Resentence without Credit for Time Served: Unequal Protection of the Laws,* 35 MINN. L. REV. 239, 245 (1951). (Italics in original.) His answer is that

> "there is no sound rationale for this treatment of an unfortunate class of criminal defendants. The injustice and illegality of the treatment the defendant has received before his first sentence began is no justification for discriminating against him at a second proceeding. * * *
>
> It scarcely needs argument to show that the circumstance that the defendant has received treatment in the first instance which was violative of the Constitution is not a valid reason for making the distinction. Nor is it a policy congruent with our constitution to permit courts to deny credit for time already served, and thus discourage the use of review procedures."

Id. at 251.

to be quite equivalent to a class described by race, right-handedness, indigence, or some other factor equally irrelevant in any proper determination of those whose sentences might appropriately be reviewed."[17]

Not only is the classification not a rational means for effectuating any legitimate state policy, but it also frustrates the pursuit of post-conviction remedies provided by the State. Courts should be especially vigilant to protect access to these remedies, rather than strive to fashion a doctrine inhibiting the exercise of the right to review.[18]

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[17] Van Alstyne, *In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606, 683 (1965).

The instant case does not confront us with the question of whether the classification is reasonably related to a valid *legislative* purpose. The distinction we are asked to hold unconstitutional is solely a judicial creation, and thus cannot claim the presumption in favor of a legislatively declared public policy. There can be no justification, nor has the State offered any, for special treatment of this isolated class. Even if the state were to attempt to treat as a special class subject to increased penalties those as to whom additional adverse information were discovered after the first sentencing, the short answer, as we have shown, would be that this is prohibited. As Judge Marshall said in United States *ex rel* Hetenyi v. Wilkins, 348 F.2d 844, 859 (2d Cir. 1965):

> "It is difficult to understand how the fundamental unfairness inherent in allowing a prosecutor to 'do better a second time' (Mr. Justice Frankfurter, concurring in Brock v. North Carolina, *supra*, 344 U.S. at 429, 73 S.Ct. at 351) is mitigated by conditioning this second chance on a successful appeal by the accused."

[18] See Griffin v. Illinois, 351 U.S. 12, 18, (1956), holding that even though "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," it cannot, without violating the due process and equal protection clauses, grant appellate review in such a way that some convicted defendants are discriminated against. This thought was further amplified by Justice Frankfurter, concurring in the judgment:

> "[N]either the fact that a State may deny the right of appeal altogether nor the right of a State to make an appropriate classification, * * * nor the right of a State to lay down conditions it deems appropriate for criminal appeals, sanctions differentiations by a State that have no relation to a rational policy of criminal appeal or authorizes the imposition of conditions that offend the deepest presuppositions of our society."

351 U.S. at 21-22. See also Douglas v. California, 372 U.S. 353, 365 (1963) (dissenting opinion).

Even if the State's policy is to prevent insubstantial appeals, limiting the class to successful appellants would not be a rational means of accomplishing this purpose, since it has too broad a sweep—chilling meritorious appeals as well as frivolous ones. The inequity of such a system is apparent when it is realized that only prisoners whose appeals have been found meritorious are subjected to the peril of a higher resentence. Ironically, those whom the State admits having initially denied a fair trial are the only ones who stand to receive greater punishment. Thus, the threatened class is both underinclusive, in that those who do not pursue post-conviction remedies might also have been too leniently sentenced, and overinclusive, since not all bearing the risk (and thus deterred from attacking an unconstitutional conviction) were originally dealt with too lightly.[19]

IV. *Double Jeopardy*

In view of the foregoing, we need not rest our decision on double jeopardy grounds. We are persuaded, however, that the constitutional protection against double jeopardy would also be violated if an increased sentence or a denial of credit is permitted on retrial.[20]

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[19] Tussman & TenBroek, The Equal Protection of the Laws, 37 CALIF. L. REV. 341, 344-53 (1949).

[20] We find ourselves in full accord with the Second Circuit in United States *ex rel* Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965), as to the resolution of the issue of whether the double jeopardy clause of the Fifth Amendment is applicable to the states. That court concluded that at least certain of the policies militating against placing a defendant twice in jeopardy are "incompatible with due process of law." *Id.* at 850. As that circuit found true of the multiple prosecutions to which Hetenyi was subjected, similarly, we think that the North Carolina practice of permitting an accused, who has successfully appealed his conviction, to bear the risk of an increased sentence:

> "is that kind of double jeopardy * * * [which] has subjected him [to] a hardship so acute and shocking that our policy will not endure it * * * [and] violate[s] those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.' "

Palko v. Connecticut, 302 U.S. 319, 328 (1937).

Double jeopardy, rather than being a single doctrine, is actually comprised of three separate though related rules,[21] prohibiting (1) reprosecution for the same offense following acquittal,[22] (2) reprosecution for the same offense following conviction,[23] and (3) multiple punishment for the same offense.[24] In *Green* v. *United States*, 355 U.S. 184 (1957), the Supreme Court invoked the first rule, that an accused may not be reprosecuted for the offense of which he was acquitted at the first trial. The Court held that the double jeopardy clause precluded a retrial for first-degree murder following defendant's successful appeal from his conviction of second-degree murder, on the theory that the jury in the first trial, by returning a verdict of second-degree murder, *impliedly acquitted* him of the charge of first-degree murder.

In a footnote, the *Green* majority declared—without further explanation—that *Stroud* v. *United States*, 251 U.S. 15 (1919), was "clearly distinguishable."[25] 355 U.S. at 195

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[21] See Comment, *Twice in Jeopardy*, 75 YALE L.J. 262 (1965).

[22] United States v. Ball, 163 U.S. 662, 671 (1896). See Green v. United States, 355 U.S. 184 (1957), for the doctrine of "implied acquittal." This doctrine has been expanded to include punishment as well as degree of offense. People v. Henderson, 60 Cal.2d 482, 386 P.2d 677 (1963).

[23] *E.g.*, *In re* Nielson, 131 U.S. 176 (1889). *Cf.* Downum v. United States, 372 U.S. 734 (1963) (reprosecution barred following mistrial due to actions of the government).

[24] *E.g.*, *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873). See Louisiana *ex rel* Francis v. Resweber, 329 U.S. 459, 462 (1947).

[25] Justice Frankfurter, however, maintained that it was all but impossible to distinguish the two situations:

> "As a practical matter, and on any basis of human values, it is scarcely possible to distinguish a case in which the defendant is convicted of a greater offense from one in which he is convicted of an offense that has the same name as that of which he was previously convicted but carries a significantly different punishment, namely death rather than imprisonment."

355 U.S. at 213 (dissenting opinion). The Supreme Court of California, in People v. Henderson, 60 Cal.2d 482, 386 P.2d 677 (1963), agreed with Justice Frankfurter that *Stroud* had been vitiated by *Green*. Justice Traynor, speaking

n.15. There the defendant was retried for first degree murder and sentenced to death, following reversal of his prior conviction, for which he had received a sentence of life imprisonment. From a reading of the *Stroud* opinion, it appears that the case was argued to the Court on the theory that the defendant was put twice in jeopardy for the same offense merely by being retried on an indictment for first degree murder.[26] There is no indication that the Court was presented with the argument that the risk of an increased penalty on retrial violates the double jeopardy clause by being a double punishment for the same offense. *Stroud* thus stands for no more than the well-established proposition that the double jeopardy clause does not entitle a defendant who successfully attacks his conviction to absolute immunity from reprosecution.[27]

It is clear, therefore, that the Court was concernd in *Green* only with that aspect of double jeopardy which pro-

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for the majority, the efore held that an accused may not be given a more severe sentence on retrial obtained after a successful attack on his first conviction. The rationale appears to be that in fixing the punishment at imprisonment for life, the defendant was "acquitted" of the death penalty and hence was protected by the double jeopardy prohibition from "retrial" on the greater of the alternative punishments. (The double jeopardy provision in the California constitution is substantially identical to that of the Fifth Amendment, so that the court did not have to determine whether the Fifth Amendment provision itself was applicable.)

The California courts have not limited the application of the double jeopardy provision to cases in which the prosecutor has sought on the second trial to raise the punishment to the death penalty, but have also followed the rule laid down in *Henderson* where longer prison sentences are involved. People v. Nanga-Parbet Ali, 35 U.S.L. WEEK 2580 (Calif. Sup. Ct. Mar. 3, 1967); *In re* Ferguson, 233 Cal. App.2d 79, 43 Cal. Rept. 325 (1965).

[26] The Court discussed only that aspect of double jeopardy which protects a defendant from a "second trial" and held that since the accused had himself appealed his conviction and sought a new trial, he was not entitled to invoke the double jeopardy provision of the Constitution. 251 U.S. at 18.

[27] See, *e.g.*, Bryan v. United States, 338 U.S. 552 (1950); United States v Vall, 163 U.S. 662 (1896).

hibits multiple *prosecutions* for the same offense, and was not faced with the precise question that is before us—whether a harsher punishment following retrial for the same offense is prohibited by the double jeopardy clause.

Patton analogizes his situation to that in *Green,* asserting that as Green was "impliedly acquitted" of the *greater degree* of murder when he was convicted of the lesser degree of that offense, similarly, Patton was "acquitted" of any *higher penalty* when he was sentenced to twenty years' imprisonment. And as the accused in *Green* was protected by the double jeopardy clause from retrial for *first* degree murder by a parity of reasoning, Patton contends that the double jeopardy clause protects him from being "retried" for the penalty of which he had been "acquitted" at his first trial, namely, anything between the twenty years he actually received and the statutory maximum. On retrial, he asserts, he could only be "up to the degree of punishment of which he was originally convicted."[28]

Defendant recognizes, and we agree, that to maintain that he was "acquitted" at the first trial of any penalty greater than twenty years, is as much a fiction as that he has "waived" the benefit of his initial sentence by appealing his conviction.[29] For this reason, we do not rest solely on the "implied acquittal" doctrine, preferring to emphasize a somewhat different aspect of double jeopardy—the prohibition against multiple punishment. See *Ex Parte Lange,* 85 U.S. (18 Wall.) 163 (1873).[30] It is this aspect which has

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[28] Van Alstyne, *op cit. supra,* note 17, at 635. See Whaley v. North Carolina, ... F.2d ....., decided this day.

[29] See Part II, *supra.*

[30] "If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And * * * there has never been any doubt of * * * [this rule's] entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.

* * * *

been consistently relied upon to prohibit an increase in a defendant's sentence, once service has commenced. *E.g., Ex Parte Lange, supra; United States* v. *Benz,* 282 U.S. 304, 307 (1931); *United States* v. *Sacco,* 367 F.2d 368 (2d Cir. 1966); *United States* v. *Adams,* 362 F.2d 210 (6th Cir. 1966); *Kennedy* v. *United States,* 330 F.2d 26 (9th Cir. 1964).

We perceive no constitutionally significant distinction between the increases prohibited in the cases cited above and an increase in punishment following retrial. Thus, unless a defendant is held to waive this double jeopardy protection in seeking a new trial, a harsher penalty may not be imposed. And we have already declared, in Part II of this opinion, that we decline to predicate a prisoner's exercise of his right to seek a new trial on the fiction that he has "waived" the benefits of his initial sentence, because of the restrictive effect this has on access to post-conviction remedies.[31] This is in accord with this circuit's decision in *United States* v. *Walker,* 346 F.2d 428 (4th Cir. 1965), that in

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[T]he Constitution was designed as much to prevent the criminal from being twice punished for the same offense as being twice tried for it."

85 U.S. at 168, 173. (Emphasis supplied.)

That the framers were concerned with multiple punishment is indicated by the text of the double jeopardy provision initially proposed by Madison, cited in Green v. United States, 355 U.S. 184, 201-202 (1957) (dissenting opinion of Frankfurter, J.): "No person shall be subject, except in cases of impeachment, to more than one punishment *or* one trial for the same offense * * *." (Emphasis supplied.)

[31] The primary focus of the majority opinion in *Green* was not on protecting the accused from reprosecution per se, but on protecting his access to post-conviction remedies. See United States v. Ewell, 383 U.S. 116, 127-28 (1966) (dissenting opinion of Fortas, J.):

> "Although the decision in *Green* was premised upon the Double Jeopardy Clause, its teaching has another dimension. *Green* also demonstrates this Court's concern to protect the right of appeal in criminal cases."

See also Van Alstyne, *op. cit. supra,* note 17, at 632.

seeking correction of an erroneous sentence,[32] a defendant does not waive his double jeopardy right not to be subjected to multiple punishment. See *Walsh* v. *United States*, 374 F.2d 421, 426 (9th Cir. 1967) and *Ekberg* v. *United States*, 167 F.2d 380, 388 (1st Cir. 1948), discussed more extensively in *Whaley* v. *North Carolina*, ... F.2d .... (decided this day).

To summarize, we conclude that increasing Patton's punishment after the reversal of his initial conviction constitutes a violation of his Fourteenth Amendment rights in that it exacted an unconstitutional condition to the exercise of his right to a fair trial, arbitrarily denied him the equal protection of the law, and placed him twice in jeopardy of punishment for the same offense.

We affirm the District Court's order to release the defendant from confinement unless he is constitutionally resentenced by the state court to a term not exceeding 20 years from the date of his original sentence, passed on October 26, 1960, with full credit for the time already served.[33]

Affirmed.

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[32] See Note, 80 HARV. L. REV. 891, 896-97 (1967), where this concept was developed with specific reference to the District Court's decision in the present case.

[33] Consequently, having now served nearly 7 years of his 20 year sentence, Patton is presently eligible to be considered for parole. See N.C. GEN. STAT. § 148-58 (Replacement vol. 1964), which provides that a prisoner shall be eligible for parole after serving a fourth of a determinate sentence.

Appendix D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,005

Eddie W. Patton,
Appellee,

versus

State of North Carolina,
Appellant.

ORDER

The court, having fully considered the petition for rehearing en banc, hereby denies the same.

CLEMENT F. HAYNSWORTH, JR.
Chief Judge, Fourth Circuit

SIMON E. SOBELOFF
United States Circuit Judge

FILED

SEP 5- 1967

HERBERT S. BOREMAN
United States Circuit Judge

MAURICE S. DEAN
CLERK

ALBERT V. BRYAN
United States Circuit Judge

HARRISON L. WINTER
United States Circuit Judge

A true copy,

Teste:

Maurice S. Dean, Clerk,
U. S. Court of Appeals for the
Fourth Circuit

By: Margaret L. Davis,
Deputy Clerk.